G v. H

HIGH COURT, AUSTRALIA
BRENNAN, DEANE, DAWSON, GAUDRON & McHUGH JJ.
[F.C. 94/043]
19 OCTOBER 1994

***FAMILY LAW**: Parentage of child in dispute - Order to determine parentage made - Failure to undergo test - Whether inference can be drawn - Whether there is evidence to prove paternity.*

H is the mother of a male child born on 31 July 1987. She claims that G, with whom she had a personal and sexual relationship in 1986, is the child's father. Parentage was in issue because H worked as a prostitute during the period of her relationship with G and she had engaged in sexual intercourse "with clients on 4 or 5 days of the week and had between 3 and 6 clients per day". H brought proceedings against G in the Family Court of Australia for maintenance of the child and for an order under s. 66 W(1) of the Family Law Act 1975 (the Act) that she and G "submit to the testing procedures for the purpose of obtaining information to assist in determining the parentage of the child. An order was granted without opposition. However G contravened the order by declining to undergo the test and paternity had to be decided on the basis of the available evidence and the inference, if any, to be drawn pursuant to s. 66 W(5) of the Act.

Held:

[1] The unchallenged evidence of the contraceptive and preventive measures which H used with her clients, in particular the evidence that all three measures were always used, the evidence that, with G, there were occasions when she took no contraceptive measures and the fact that there were occasions when G did not use a condom (which is implicit in the trial Judge's finding that G used a condom as often as possible and more often than not) and G's own admission that it was "possible" that he was the father of the child, lead to the conclusion, as a matter of legal reasoning, that of all the persons with whom H had intercourse, in the period during which conception could have occurred, G is the most likely to be the father of the child.

[2] The inference if any, to be drawn pursuant to s. 66 W(5) of the Act will depend on the circumstances of the particular case. And, of course, it must be consistent with the evidence and the findings. As a general rule there will be an inference as to the state of mind of the person who has contravened the order made under s. 66 W(1) and another as to the question whether he or she is the parent of the child concerned.

[3] So far as G's state of mind is concerned, it may be inferred that he has chosen to take the risk of being held to be the father of H's child and liable for his maintenance and support rather than submit to a test which will effectively disclose whether or not he is in fact the father. That is not an inference that is in any way inconsistent with the evidence, the findings or the reasons preferred by him for refusing the test. And if, as here, the evidence establishes that a particular person is the most likely person to a parentage test, there is no injustice involved if such finding is ultimately made.

[Appeal dismissed]

Cases referred to:
Martin v. Osborne [1936] 55 CLR 367 ***(refd)***
Jones v. Dunkel [1959] 101 CLR 298 ***(refd)***

R. v. Burdett [1820] 4 B & Ald 95 [106 ER 873]) ***(refd)***
Finance Facilities Pty. Ltd. v. Federal Commissioner of Taxation [1971] 127 CLR 106 ***(refd)***
Weissensteiner v. The Queen [1993] 178 CLR 217 ***(refd)***
*Newis v. Lark [1571] 2 plowd 403 at 412 [75 ER 609 621]****(refd)***
Cooper v. Slade [1858] 6 HLC 746 ***(refd)***
Neat Holdings Pty. Ltd. v. Karajan Holdings Pty. Ltd.[1992] 110 ALR 449 ***(refd)***
Helton v. Allen [1940] 63 CLR 691 ***(refd)***
Rejfek v. McElroy [1965] 112 CLR 517 ***(refd)***
Re C (No.2) [1992] 15 Fam LR 355 ***(refd)***
Duroux and Martin [1993] 17 Fam LR 130 ***(refd)***
Briginshaw v. Briginshaw [1938] 60 CLR ***(dist)***
Petty v. The Queen [1991] 173 CLR 95 ***(refd)***

Legislation referred to:
Family Law Act, 1975 ss. 66A(1), 66P 66Q, 66R, 66S, 66T, 66U, 66W(1)(2)(c) & (5), Divisions 6, 7 & 8 of Pt. VII,
Family Law Amendment Act 1983, ss. 54, 99A(4)
Family Law Amendment Act 1987, s. 53

For the appellant - Crowley & Greenhalgh
For the respondent - Walters & Co.

JUDGMENT

Brennan & McHugh JJ:
The facts of this case and the statutory provisions which are relevant to its determination are set out in the reasons for judgment of the majority. Although we are in agreement with the conclusion at which their Honours arrive and with much of what is contained in those reasons, there are two steps in the reasoning which we are respectfully unable to adopt.

The first is the statistical calculation of the likelihood of concurrent failure of the methods of contraception adopted by H when having sexual intercourse with her clients. There was no evidence as to the statistical failure of any of these methods and the postulating of possible rates of concurrent failure of these methods is not, in our respectful view, an appropriate consideration in determining whether, on the balance of probabilities, G is the father of H's child.

The second, and a more important step, relates to the drawing of an inference of paternity from an unreasonable failure to comply with a parentage testing order made under s. 66W of the Family Law Act 1975 (cth). In this case, there is no doubt but that G might be the father of H's child. But there are many other men who might be the father. G and many others had sexual intercourse with H at about the time of conception. All other men who had sexual intercourse with H during the possible period of conception wore condoms and during each of those acts of intercourse H took additional contraceptive measures. She did not do so during acts of intercourse with G and G did not always wear a condom. G and H had a personal, not a paid, relationship during that period. The difference between the contraceptive practices adopted when G had sexual intercourse with H and those adopted when any other man had sexual intercourse with her makes it more likely that G rather than any other man is the father of H's child. However, the inference that G is the father cannot be drawn with much confidence merely from the facts above stated.

Then there is G's failure to submit to a parentage testing procedure ordered under s. 66W of the Family Law Act. Section 66W(5) authorizes the Court to "draw such inferences as ap-

pear just in the circumstances" from a person's failure to comply. It is one thing to say that the Court may draw an inference; it is another to say what inference should be drawn. An inference is a tentative or final assent to the existence of a fact which the drawer of the inference bases on the existence of some other fact or facts. The drawing of an inference is an exercise of the ordinary powers of human reason in the light of human experience; it is not affected directly by any rule of law. Legal principle may confine that basic facts in order to exclude irrelevancies and, where proof beyond reasonable doubt is required, the legal standard of proof precludes the drawing of an inference for the purpose of determining an issue in litigation when the basic facts are consistent with an innocent inference. (*Martin v. Osborne* [1936] 55 CLR 367). But the drawing of an inference is part of the process of fact finding: it has to do with the minor premises in the syllogism of judgment, not with the major premises of legal principle. Therefore, although s. 66W(5) authorizes the drawing of a just inference from a failure to comply with a parentage testing order, it can say nothing about the inference which should be drawn from the facts of a particular case.

In many cases, it would be just to draw from a putative father's failure to comply with a s. 66W order the inference that he knows facts which make it likely that the test would establish his paternity. (See *Re C* (No.2) [1992] 15 Fam LR 355). Provided the putative father's failure to comply can be attributed to his consciousness of facts demonstrating his likely paternity, it is just to draw the inference that there are facts having that probative effect. But that is not the present case. Here, Lindenmayer J. noted that G "appears to have declined to submit to testing because, subjectively, he believes that he is being singled out or discriminated against - in effect, his objection comes down to 'why should I have to undergo testing and not them?'". His Honour refused to draw an inference of paternity, saying:

> Although I have little doubt that the respondent is certainly frightened that there is a possibility, however remote, that the results of the test may indicate fairly conclusively that he is the father I am not prepared in the circumstances to draw the inference that the test was refused because the respondent believed that he is the father or at the least that there was such a high risk of that conclusion being reached that he preferred to stifle the evidence.

In our opinion, his Honour was entitled to refuse to draw an inference of paternity from G's refusal to submit to parentage testing. If the failure to submit was attributable to G's stated objection to the making of the parentage testing order, his mere failure to submit to the procedure says nothing which tends to identify the father of H's child.

Nevertheless, G could have submitted to the parentage testing procedure and thereby provided the evidence needed to confirm or deny his paternity. There was no reasonable ground (such as a religious objection or physical infirmity) advanced for G's failure to submit to the procedure ordered but his failure simply leaves the Court with the applicant's evidence as the only material from which an inference of his paternity might be drawn. But, in the absence of the evidence - indeed, the conclusive evidence - which G could have provided, the inference of his paternity can be drawn with more confidence than it would otherwise have been drawn. (*Jones v. Dunkel* [1959] 101 CLR 298 at 308, 312, 321 (the citations from *R. v. Burdett* [1820] 4 B & Ald 95 [106 ER 873]); *Finance Facilities Pty. Ltd. v. Federal Commissioner of Taxation* [1971] 127 CLR 106 at 119).

When a question of paternity arises and the evidence discloses that one of two or more men must be the father but it is uncertain which of those men is the father, a slight preponderance of evidence tending to show that a particular man is the father may be sufficient to establish paternity if that man fails without reasonable excuse to comply with a parentage

testing order. That is because, first, paternity is an issue that, as between two or more men, is inherently difficult to prove without proper parentage testing, so that a slight preponderance of evidence may be all that can be offered in proof and, secondly, the testing procedures now available have been demonstrated to be so accurate that their results will almost inevitably conclude the issue.

We do not suggest that paternity is not a serious issue. It is serious because paternity carries with it both significant privileges and grave responsibilities, only some of which relate to monetary obligations. The attribution of paternity may be seen by a child's mother to be no more than the means of procuring a maintenance order during the child's infancy, but a finding that a particular man is the child's father might well be of the greatest significance to the child in establishing his or her lifetime identity. But, when a Court is deciding whether a party on whom rests the burden of proving an issue on the balance of probabilities has discharged that burden, regard must be had to that party's ability to adduce evidence relevant to the issue and any failure on the part of the other party to adduce available evidence in response. As Mason CJ., Deane and Dawson JJ. explained in *Weissensteiner v. The Queen*: [1993] 178 CLR 217 at 227.

> it has never really been doubted that when a party to litigation fails to accept an opportunity to place before the Court evidence of facts within his or her knowledge which, if they exist at all, would explain or contradict the evidence against that party, the Court may more readily accept that evidence. It is not just because uncontradicted evidence is easier or safer to accept than contradicted evidence. That is almost a truism. It is because doubts about the reliability of witnesses or about the inferences to be drawn from the evidence may be more readily discounted in the absence of contradictory evidence from a party who might be expected to give or call it.

In order that justice be done so far as the nature of the subject permits, the burden of proof of paternity in proceedings for the maintenance of a child born to an unmarried mother must be discharged when the party on whom it rests adduces the evidence available to her or him and that evidence tilts the balance of probability in favour of the paternity alleged and the putative father, having the sole capacity to provide conclusive evidence by submitting to a parentage testing order, fails or refuses to do so.

Although Strauss J., with whom Fogarty and Wilczek JJ. agreed in the Full Court might be taken to suggest, contrary to our opinion, that it is just to infer from G's failure to submit to the parentage testing procedure that G is the father of H's child, his Honour ultimately treated G's failure simply as a circumstance strengthening the inference drawn from other evidence. His Honour said: (*G v. H* [1993] 16 Fam LR 525 at 532-533).

> The evidence of the appellant raises a sufficient *prima facie* case against the respondent. That there was a *prima facie* case is implicit in the finding that the respondent's refusal to undergo parentage testing was unreasonable. Having regard to the practically conclusive evidence which only he can make available, he has not sufficiently answered the appellant's case.

We agree. It follows that in our view a finding of paternity was properly made by the Full Court. We would dismiss the appeal.

Deane, Dawson & Gaudron JJ:

H is the mother of a male child born on 31 July 1987. She claims that G, with whom she had a personal and sexual relationship in 1986, is the child's father. She brought proceedings against him in the Family Court of Australia for maintenance of the child and for an order, under s. 66W(1) of the Family Law Act 1975 (Cth) ("the Act"), that she and he "submit to testing procedures for the purpose of obtaining information to assist in determining the

parentage of the child". Parentage was in issue because H worked as a prostitute during the period of her relationship with G and, according to her answers to specific questions or interrogatories, she engaged in sexual intercourse "with clients on 4 or 5 days of the week and [had] between 3 and 6 clients per day".

The statutory provisions

Although there was an earlier provision to similar effect [s. 99A(4), which was inserted by s. 54 of the Family Law Amendment Act 1983 (Cth) and repealed by s. 53 of the Family law Amendment Act 1987 (Cth), provided that "[w]here a person who has attained the age of 18 years fails to comply with a direction given under sub-section (1) to submit to a prescribed medical procedure, the person is not liable to any penalty in respect of the failure to comply, but the Court may draw such inferences from the failure to comply as appear proper in the circumstances"], s. 66W was inserted in the Act in 1987 along with other provisions directed "to ensur[ing] that children receive a proper level of financial support from their parents" [s. 66A(1), identifying the principal object of Div. 6 of the Act which is concerned with the maintenance of children.] and to facilitating proof of parentage. Those other provisions include the provisions of Div. 7 of Pt VII which set forth a number of presumptions, including presumptions of parentage arising from marriage, [s. 66P.] from registration of birth [s. 66R provides that "[a] person whose name is entered in a register of births or parentage information, kept under the law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction, as a parent of a child shall be presumed to be a parent of the child."] from findings of Courts [s. 66S.] and from an executed instrument acknowledging paternity [s. 66T.]. Section 66Q, which is also in Div. 7, establishes a presumption based on cohabitation and provides that "[a] child born to a woman who, for a period of at least 6 months ending not more than 10 months before the birth, cohabited with a man to whom she was not married shall be presumed to be a child of that man." By s. 66U, each of the presumptions arising under Div. 7 "is rebuttable by proof on a balance of probabilities".

Division 8 of Pt VII, which was also inserted in 1987, is concerned with evidence of parentage. Section 66W, which is in that Division, relevantly provides:

> (1) . . . where the parentage of a child is in issue in proceedings under this Act, the Court may, on the request of a party to the proceedings, on the request of a person representing the child under an order made under s. 65 [s. 65 provides that "[w]here, in any proceedings under this Act in which the welfare of a child is relevant, it appears to the Court that the child ought to be separately represented, the Court may, of its own motion, or on the application of the child or of an organization concerned with the welfare of children or of any other person, order that the child be separately represented,and the Court may make such other orders as it considers necessary for the purpose of securing such separate representation."] or of its own motion, make an order requiring a parentage testing procedure to be carried out in relation to a person referred to in subsection (2) for the purpose of obtaining information to assist in determining the parentage of the child.
>
> (2) The order under subsection (1) may be made in relation to:
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> (a) the child;
>
> (b) a person known to be the mother of the child; or
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> (c) any other person where the Court is of the opinion that the information that could be obtained if the parentage testing procedure were to be carried out in relation to the person might assist in determining the parentage of the child.
>
> (5) Where a person who has attained 18 years of age contravenes an order under this section, the person is not liable to any penalty in relation to the contravention, but the Court may draw such inferences as appear just in the circumstances.

The proceedings for maintenance

An order was made, without apposition, that a parentage testing procedure be carried out by Genetic Technologies Corporation Pty. Ltd. in relation to G, H and the child. Evidence was presented, and it has not been challenged, that the accuracy of DNA fingerprinting, the technology to be used for the testing procedure, is "[of] the order of 99.99 percent or greater" and that, if error occurred, "it would normally result in the person who was the father being shown as not being the father rather than the other way around". As it happened, G contravened the order by declining to undergo the test and paternity had to be decided on the basis of the available evidence and the inference, if any, to be drawn pursuant to s. 66W(5) of the Act.

The matter was heard at first instance by Lindenmayer J. who said that he "harbour [ed] grave doubts as to the credibility of [H]", largely because she had given evidence in earlier proceeding in the Magistrate's Court denying that she worked as a prostitute after August 1986 and denying, also, that she had had sexual intercourse with any male person other than G after that date. Even so, certain matters were not in dispute and parts of H's evidence were not challenged. Critically, it was not disputed that there had been a personal and sexual relationship between G and H in 1986. And it is common ground that H's evidence as to the various contraceptive and preventive measures employed with her clients was not questioned or challenged in any way. In particular, she was not cross-examined on her evidence that, from mid-1986, she used a diaphragm and spermicide and that, as well, she required her clients to use a condom to prevent the transmission of disease.

The point of contest in relation to H's evidence concerned the contraceptive and preventive measures adopted in her relationship with G. Her evidence was that, on some occasions, she took no contraceptive measures at all and that G never used condoms. G, on the other hand, gave evidence that he did use condoms, but he could not recall with what frequency and admitted he could not say he had used a condom on every occasion. Under cross-examination, he conceded that it was "possible" that he was the father of the child. The learned trial Judge rejected H's evidence on this issue and found that G used condoms "as often as possible" and "more often than not".

The unchallenged evidence of H as to the contraceptive measures taken by and with her clients did not significantly advance her case in the eyes of the trial Judge. Rather, his Honour observed that "[a]11 contraceptive and prophylactic devices are prone to failure to one extent or another" and concluded, on that basis, that even if H's evidence were taken at its highest, it would "not . .be. . . sufficient to exclude, from the ranks of possible fathers . . , any of the male clients with whom she had sexual intercourse during. . .the relevant period". In this last regard and notwithstanding that there was no suggestion to H in cross-examination that her pregnancy had been an unusually short or long one, his Honour found that conception could have occurred over a period of 9 weeks during which H "must be taken to have had sexual intercourse with between 108 and 270 male clients". Thus, his Honour saw H's case as depending substantially on the inference, if any, to be drawn from G's failure to submit to testing.

The trial Judge found that G's refusal to submit to testing was unreasonable (a matter to which we shall return), but was "not prepared. . . to draw the inference that the test was refused because [G] believed that he [was] the father or at the least that there was such a high risk of that conclusion being reached that he preferred to stifle the evidence". His Honour then concluded that, in the circumstances, "the weight to be attached to the refusal to submit to testing is insufficient even when considered in the light of the admitted acts of sexual

intercourse. . . to establish. . . that [G] is indeed the father of the child". That conclusion was reached in a context in which the trial Judge considered that proof was required on the balance of probabilities but, following *Briginshaw v. Briginshaw*, ([1938] 60 CLR 336). "with full regard to the importance and gravity of the issue".

Proceedings in the Full Court

H appealed successfully to the Full Court of the Family Court. As appears from the judgment of Strauss J. (with which Fogarty and Wilczek JJ. agreed), the Full Court approached the matter on the basis that, in the circumstances, the inference to be drawn pursuant to s. 66W(5) was that "[G] should be held to be the father of the child" ([1993] 16 Fam LR 525 at 533). The matters requiring that inference to be drawn were identified in these terms:

> The evidence of [H] raises a sufficient *prima facie* case against [G]. That there was a *prima facie* case is implicit in the finding that [G's] refusal to undergo parentage testing was unreasonable. Having regard to the practically conclusive evidence which only he can make available, he has not sufficiently answered [that] case. [ibid. at 532-533.]

G now appeals to this Court.

The argument in this Court

The argument in this Court has two aspects. The first concerns s. 66W(5). It was put that an adverse inference under that sub-section is only "just" if "not inconsistent with other evidence, including reasons for refusal, found by the [trial] Judge." The second concerns the evidence in the case. It was said that the Full Court proceeded to overturn the conclusion of the trial Judge without reference to the facts other than G's refusal to submit to the test ordered under s. 66W(1). It is convenient to deal first with the evidence in the case. And that requires some consideration of *Briginshaw v. Briginshaw*.

The evidence and Briginshaw v. Briginshaw

It is true that, apart from G's refusal to submit to testing, the Full Court did not refer to the effect of the evidence in the case beyond saying that the "evidence of [H] raises a sufficient *prima facie* case against" G. Moreover, their Honours were in error in saying that the existence of a *prima facie* case was "implicit" in the finding of the trial Judge that G's refusal was unreasonable. That finding did not reflect his Honour's assessment of the strength of the case against G. Rather, it was concerned with the reasons proffered by him for refusing to submit to the test, namely his assertion (which was not persisted with in cross-examination) that he always used a condom and his belief (which may be related to that assertion)that he should not be singled out for testing. Notwithstanding his earlier finding that the evidence of H, even at its highest, did not exclude the possibility that one of her clients might be the father, the trial Judge considered that those reasons did not constitute an acceptable explanation because there was "an ongoing sexual relationship during the time in which conception [might] have occurred". In taking that approach, his Honour doubtless had in mind s. 66W (2)(c) of the Act which permits the making of an order for a parentage testing procedure to be carried out in relation to a person if the Court is of the opinion that the test "**might** assist in determining. . . parentage".

Nonetheless, the Full Court was correct in overturning the decision of the learned trial Judge. As will be seen, the trial Judge was in error in approaching the case on the basis that the case was one in which the particular considerations referred to in *Briginshaw v. Briginshaw* were applicable. Once those considerations are put to one side, the case was one in which, in the circumstances clearly established by the evidence, the "just" inference to be drawn from G's continuing contravention of the order that he submit to testing was that it was more probable than not that the outcome of the test would be unfavourable to him. And

that must lead to the finding that, on the probabilities, he was the father of the child. We turn to explain why that is so.

As already indicated, H's evidence as to the contraceptive and preventive measures taken in the course of her work was not the subject of cross-examination. The trial Judge considered that evidence to be of little significance because of the possibility that the measures might have failed. However, in adopting that approach, his Honour seems to have overlooked that evidence-in-chief and cross-examination had been led and conducted by both sides on the basis that it could be assumed that the methods of contraception involved were ordinarily reliable and that no evidence at all was led to cast doubt upon or disprove such an assumption. Moreover, the learned trial Judge would seem to have overlooked the full significance of H's unchallenged evidence that in her relations with persons other than G, a *combination* of three contraceptive methods was invariably used. That is important because if, on a given occasion, there were one chance in ten of any one of the measures failing (in the sense of not offering complete protection against the *possibility* of conception) and the reasons for the failure of any one measure were unrelated to the others, there would be only one chance in a thousand of all three failing at the same time. And on that statistical basis, if one assumes that H had intercourse with 250 clients during the period in which conception could have occurred (a figure towards the upper end of the range postulated by the trial Judge), there would be only less than one chance in four that all three contraceptive methods would fail on at least one occasion [if the probability of the combined contraceptive methods *not* failing on any given occasion is assumed to be 999 chances in 1,000, or .999, then the probability of their failing at least once on 250 independent occasions is 1-(.999 250), or about .22] whereas the evidence indicated that G had actually had unprotected sex with H on a number of occasions during the relevant period. Of course, that says nothing about the statistical probability of conception either during unprotected voluntary intercourse with G or in the event of such a failure of contraceptive methods during intercourse with a client. Moreover, there is a difference between statistical and legal probability. However, the trial Judge seems to have had no regard to the fact that H deposed to measures which were used in combination and, perhaps, that is why her evidence was not seen as significant.

Whatever the statistical probabilities, the unchallenged evidence of the contraceptive and preventive measures which H used with her clients, in particular the evidence that all three measures were always used, her evidence that, with G, there were occasions when she took no contraceptive measures and the fact that there were occasions when G did not use a condom (which is implicit in the trial Judge's finding that G used a condom as often as possible and more often than not) and G's own admission that it was "possible" that he was the father of the child, lead to the conclusion, as a matter of legal reasoning, that of all the persons with whom H had intercourse in the period during which conception could have occurred, G is the most likely to be father of the child. Indeed, unless there are special considerations relating to proof of paternity, there is much to be said for the view that the material in evidence was of itself sufficient to discharge the onus of proof, upon the probabilities, which rested upon H. It is, however, unnecessary to pursue that question. It suffices for present purposes that, as will be seen, the material in evidence gave rise to a situation in which the "just" inference to be drawn from G's continuing contravention of the Family Court's order was an inference that it was more probable than not that the outcome of the test would be unfavourable to him.

It has been clear since the decision in *Briginshaw v. Briginshaw* that in civil cases the standard of proof is on the balance of probabilities, with due regard being had to the nature of the issue involved so that "[t]he seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal." ([1938] 60 CLR at 362 per Dixon J.; see also at 347, 350. See, as to the civil standard generally, *Newis v. Lark* [1571] 2 plowd 403 at 412 [75 ER 609 621]; *Cooper v. Slade* [1858] 6 HLC 746 at 772-773 [10 ER 1488 at 1498-1499]; *Neat Holdings pty. Ltd. v. Karajan Holdings Pty. Ltd.*[1992] 110 ALR 449 at 449-450, 67 ALJR 170-171). Thus, if there is an issue of "importance and gravity", to use the words of the trial Judge, due regard must be had to its important and grave nature.

Not every case involves issues of importance and gravity in the *Briginshaw v. Briginshaw* sense. The need to proceed with caution is clear if, for example,there is an allegation of fraud or an allegation of criminal or moral wrongdoing, as in *Briginshaw v. Briginshaw* where the allegation was adultery by a married woman, an allegation involving serious legal consequences when that case was decided (see [1938] 60 CLR at 347, 350, 353, 368, 372. See generally, as to allegations of fraud or criminal or moral wrongdoing, *Helton v. Allen* [1940] 63 CLR 691 at 701, 712; Rejfek v. McElroy [1965] 112 CLR 517 at 521-522; but cf. *Neat Holdings Pty. Ltd. v. Karajan Holdings Pty. Ltd.*[1992] 110 ALR at 450-451, 67 ALJR at 171-172). Paternity is a serious matter, both for father and for child. However, it is not clear that the question of paternity should be approached on the basis that it involves a grave or serious allegation in the *Briginshaw v. Briginshaw* sense when what is at issue is the maintenance of a child and the evidence establishes that the person concerned is more likely than anyone else to be the father. After all, paternity can be determined easily and, for practical purposes, conclusively. And now that is so, it is difficult to see why, if a person who could be the father declines to participate in procedures which will provide proof one way or the other, the child's rights to maintenance and support should nonetheless depend on the biological fact of paternity being established on the basis that, so far as the putative father is concerned, the biological fact involves an allegation in much the same category as an allegation of moral or criminal wrongdoing. Moreover, while a determination of parentage for the purposes of Family Law Act proceedings is obviously a serious matter for both the child and the putative parent, such a determination cannot properly be regarded as a declaration of paternity in the traditional sense. As Strauss J. pointed out in the Full Court, there is some doubt as to whether the Family Court has the power to make such a declaration, and it is "neither necessary nor desirable" that such a declaration be made in a case such as the present. ([1993] 16 Fam LR at 534. See also *Re C (No.2)* [1992] 15 Fam LR 355 at 365; *Duroux and Martin* [1993] 17 Fam LR 130 at 134).

As earlier indicated, there are several presumptions in Div. 7 of pt VII which are "rebuttable by proof on a balance of probabilities" [See s. 66U]. Those presumptions proceed on a basis which is diametrically opposed to the notion that, in maintenance proceedings, the biological fact of parentage involves an important or grave allegation to which due regard must be had before a finding is made in that regard. Rather, the presumptions operate in the interests of the child and provide the basis for the imposition of parental duties and responsibilities unless and until proof to the contrary is forthcoming. And although there is no presumption involved, s. 66W(5) also operates, in our view, on a basis that is opposed to the notion that the biological fact of parentage, standing alone, involves a serious or grave allegation to be determined by reference to *Briginshaw v. Briginshaw* considerations. The expression "just

inference" is, perhaps, novel, but it is apt, at the very least, to convey the notion that, given technological advances which have made proof of parentage both simple and, for practical purposes, conclusive, inferences should be drawn from a refusal to submit to testing, free of the reluctance that might be expected if the biological fact, as distinct from its possibility, were to be regarded as involving a grave or serious allegation.

Given the presumptions in Div. 7 and the terms of s. 66W(5), it seems to us that, where in proceedings under the Act the evidence establishes that a particular person could be the father of the child concerned, the question of actual paternity ought to be approached free of restraints inherent in the view that that question is, of its nature, one that "affect [s] the nature of the answer to the question whether [it] has been proved to the reasonable satisfaction of the [Court]" (*Briginshaw v. Briginshaw* [1938] 60 CLR at 362).

The inference to be drawn in the present case

The inference with which s. 66W(5) is concerned is that to be drawn from the contravention of an order requiring a parentage testing procedure to be carried out. It is not an inference to be drawn from the reasonableness or otherwise of the refusal to submit to testing or the explanation, if any, proffered for that refusal. It may sometimes be necessary to consider those reasons or explanations for the purpose of determining whether they preclude or negate an inference that might otherwise be drawn. And in that process it may be relevant to determine whether or not they are reasonable. But even so, the inference with which s. 66W(5) is concerned is that to be drawn from contravention of an order under s.66W(1). For present purposes and in terms of s. 66W(2)(c) it is contravention of an order by a person in relation to whom "[a] parentage testing procedure. . . might assist in determining the parentage of the child".

The inference, if any, to be drawn pursuant to s. 66W(5) of the Act will depend on the circumstances of the particular case. And, of course, it must be consistent with the evidence and the findings. As a general rule, there will be an inference as to the state of mind of the person who has contravened the order made under s. 66W(1) and another as to the question whether he or she is the parent of the child concerned.

So far as G's state of mind is concerned, it may be inferred that he has chosen to take the risk of being held to be the father of H's child and liable for his maintenance and support rather than submit to a test which will effectively disclose whether or not he is in fact the father. That is not an inference that is in any way inconsistent with the evidence, the findings or the reasons proffered by him for refusing the test. And if, as here, the evidence establishes that a particular person is the most likely person to be the father and that person has chosen to risk a finding that he is the father rather than submit to a parentage test, there is no injustice involved if such a finding is ultimately made.

More important, so far as G's paternity is concerned, there is an inference of a different kind. Leaving aside special considerations which arise in criminal cases as a result of the right to silence, (See *Petty v. The Queen* [1991] 173 CLR 95 at 99-101, 106-107, 118-122, 125-130. See also *Weissensteiner v. The Queen* [1993] 178 CLR 217 at 224-229, 231-236, 240-246; and the cases there referred to) it is well settled that, in the course of the ordinary processes of legal reasoning, an inference may be drawn contrary to the interests of a party who, although having it within his or her power to provide or give evidence on some issue, declines to do so. Thus, for example, there may sometimes be an inference in civil cases that the evidence, if called, would not assist that party's case (*Jones v. Dunkel* [1959] 101 CLR

298). And there may sometimes be an inference in criminal cases of "guilty knowledge", in the sense of knowledge that the evidence cannot be explained in a way that is consistent with innocence (see, for example, *Weissensteiner v. The Queen* [1993] 178 CLR at 243-245 and the cases there cited). They are inferences that are to be drawn, if at all, in accordance with strict legal reasoning. In other cases, the failure to give evidence may result in more ready acceptance of the evidence for the other party or the more ready drawing of an inference that is open on that evidence. The inferences which s. 66W(5) allows are "such inferences as appear just in the circumstances". They are not confined to inferences that can or should be drawn as a matter of strict legal reasoning and they certainly extend beyond those inferences that may be drawn from the other available evidence. That is not to say that s. 66W(5) permits of surmise: as earlier indicated, the inferences must be consistent with the other evidence. In all the circumstances of the present case, the "just" inference to be drawn was that it was more probable than not that the outcome of the Court-ordered test would be unfavourable to G. And given the accuracy of the test, that must lead to the finding that, on the probabilities, he was the father of the child.

It must be remembered that, while the proceedings in form are between H and G, the underlying purpose of their availability is, as said above, to ensure "that children receive a proper level of financial support from their parents"[s. 66A(1)]. An order under s. 66W that a person submit to a parentage testing procedure will only be made where the Court thinks it appropriate in the circumstances. When made, it can ordinarily be readily obeyed. If obeyed, it will effectively disclose whether the particular person is in fact the parent. If, as in the present case, such an order is made for the purposes of proceedings in relation to the maintenance of a child against the person whom the evidence identifies as the most likely to be the father of the child and that person, without reasonable excuse, refuses to submit to the order, the just inference to be drawn for the purposes of those proceedings is that it is more probable than not that the Court-ordered test would disclose that that person is the father. Indeed, depending upon the circumstances, such an inference could be "just" for the purposes of such maintenance proceedings notwithstanding that the other evidence in the case did not go that far.

Conclusion

Although we have expressed the inferences which should properly and justly be drawn in the circumstances of this case a little differently from the inference identified by the Full Court of the Family Court, there is no need for any variation of its order by which the matter was remitted to the trial Judge for further consideration. The appeal should be dismissed.